

At a Glance

S. 2428, False Claims Amendments Act of 2021

As reported by the Senate Committee on the Judiciary on November 16, 2021

By Fiscal Year, Millions of Dollars	2022	2022-2027	2022-2032
Direct Spending (Outlays)	*	-7	-17
Revenues	*	39	111
Increase or Decrease (-) in the Deficit	*	-46	-128
Spending Subject to Appropriation (Outlays)	*	15	not estimated

Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2033?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

* = between -\$500,000 and \$500,000.

The bill would

- Clarify that a federal court may find that a person violated the False Claims Act (FCA) even if the federal government has foregone a refund or paid a claim despite having actual knowledge of fraud or misrepresentation by that person
- Require the government to identify a purpose for dismissing FCA cases brought by whistleblowers and give whistleblowers an opportunity to show that the dismissal is fraudulent, arbitrary, and capricious, or contrary to law
- Expand whistleblower protections in FCA cases to former employees
- Direct the Government Accountability Office to report on FCA's effectiveness after the bill is enacted

Estimated budgetary effects would mainly stem from

- Additional collections from damages and penalties in FCA cases that would not otherwise have been brought or won
- Spending by federal agencies of recoveries from FCA penalties that would not otherwise have been collected
- Increases in spending subject to appropriation for the Department of Justice to justify FCA case dismissals
- Increases in spending subject to appropriation for reporting to the Congress

Areas of significant uncertainty include

- Estimates of the number of successful FCA cases that result in additional collections under the bill
- Estimates of the number of FCA cases that would not otherwise have been brought or would have been dismissed but for the bill

Detailed estimate begins on the next page.

Bill Summary

S. 2428 would amend the False Claims Act (FCA), which imposes liability on individuals or companies who defraud the government. Under FCA, whistleblowers, called relators, with knowledge of current or past instances of false or fraudulent conduct can file qui tam claims—legal actions on behalf of the government—for a share of the proceeds or settlement of the claim.

The bill would:

- Clarify that a federal court may find that a person violated the False Claims Act (FCA) even if the federal government has foregone a refund or paid a claim despite having actual knowledge of fraud or misrepresentation by that person,
- Require the government to identify the purpose for dismissing a qui tam FCA case brought by a whistleblower and allow the whistleblower an opportunity to show that the dismissal is fraudulent, arbitrary, and capricious, or contrary to law,
- Extend FCA protections to former federal employees, and
- Direct the Government Accountability Office (GAO) to report on the effectiveness of FCA as amended by S. 2428.

Estimated Federal Cost

The estimated budgetary effect of S. 2428 is shown in Table 1. The costs of the legislation cross many budget functions, but most are within budget functions 050 (national defense) 550 (healthcare), and 750 (administration of justice).

**Table 1.
Estimated Budgetary Effects of S. 2428**

	By Fiscal Year, Millions of Dollars											2022- 2027	2022- 2032
	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032		
Decreases in Direct Spending													
Estimated Budget Authority	*	*	-1	-2	-2	-2	-2	-2	-2	-2	-2	-7	-17
Estimated Outlays	*	*	-1	-2	-2	-2	-2	-2	-2	-2	-2	-7	-17
Increases in Revenues													
Estimated Revenues	*	*	4	9	13	13	14	14	14	15	15	39	111
Net Decrease in the Deficit From Changes in Direct Spending and Revenues													
Effect on the Deficit	*	*	-5	-11	-15	-15	-16	-16	-16	-17	-17	-46	-128
Increases in Spending Subject to Appropriation													
Estimated Authorization	*	3	3	3	3	3	n.e.	n.e.	n.e.	n.e.	n.e.	15	n.e.
Estimated Outlays	*	3	3	3	3	3	n.e.	n.e.	n.e.	n.e.	n.e.	15	n.e.

n.e. = not estimated; * = between -\$500,000 and \$500,000.

Basis of Estimate

S. 2428 would amend FCA, which generally provides that a person or entity that knowingly submits false or fraudulent claims for payment or approval by the government may be subject to civil action in a federal court. The bill’s provisions would take effect on the date of enactment, and most would apply to cases filed on or after that date. For this estimate, CBO assumes that S. 2428 will be enacted near the end of fiscal year 2022.

Changes to the Materiality Standard. In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Supreme Court ruled that if the government pays a particular claim or regularly pays a particular type of claim in full despite knowing that statutory, regulatory, or contractual requirements were violated, then that is very strong evidence that the recipient’s misrepresentation about compliance with those requirements did not affect the government’s decision to pay.¹ In other words, the misrepresentation was not material. That ruling by the Court, which concerns what is known as the materiality standard, has made it more difficult in some cases for the Department of Justice (DOJ) to prove that a claimant has committed

1. *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 195 (2016), www.supremecourt.gov/opinions/15pdf/15-7_a074.pdf.

fraud. S. 2428 would clarify that the government's knowledge of fraud should not rule out the possibility of a claim under FCA if other reasons exist for providing such payments.

DOJ could not provide an estimate of the number of cases that would be affected by this provision. Using information about recent unsuccessful or dismissed cases, however, CBO estimates that within several years DOJ would succeed in about three FCA cases each year that would not otherwise have been won. That estimate is subject to significant uncertainty regarding the incidence of fraud, legal interpretations of the bill, and other factors, and the number could be higher or lower than CBO estimates. Based on the number of cases filed each year, CBO expects that two additional qui tam cases and one additional non-qui tam case would be successful each year.

Dismissal. S. 2428 would require DOJ to identify a purpose for dismissing a qui tam FCA case and shift the burden to the whistleblower to show that the dismissal is fraudulent, arbitrary, and capricious, or contrary to law. By requiring DOJ to justify its motion to dismiss and establishing a standard for the person initiating the action to demonstrate that the dismissal is improper, it would make it more difficult for DOJ to dismiss cases. CBO anticipates that the provision could prolong litigation but has no basis for estimating the effect on the amounts recovered for the government.

Whistleblower Protections. In some cases, the bill would expand whistleblower protections to some former federal employees. That protection could lead to the filing of qui tam cases that might otherwise have been forgone, but CBO cannot predict the number of those additional cases.

Revenues and Direct Spending

Each year, DOJ tries several hundred FCA cases; in 2021, the government recovered more than \$5.6 billion from FCA settlements and judgments. CBO anticipates that under S. 2428, the federal government would pursue additional cases that would result in the collection of additional damages and civil penalties.

In general, damages recovered under FCA are set at two to three times the actual damages incurred, plus civil penalties of \$5,000 to \$10,000 per offense (as adjusted annually for inflation). Recoveries of actual damages incurred are recorded as offsetting receipts or as offsetting collections, depending on the agency collecting the damages. In some cases, agencies may be able to spend these recoveries. The remaining recoveries, consisting of the double or treble damages beyond the actual damages incurred and the civil penalties, are recorded as revenues and deposited into the Treasury. Whistleblowers are eligible to collect between 10 percent and 30 percent of the total collected in qui tam cases.

Using information from DOJ, CBO estimates that the average FCA case under current law involves about \$6 million in collections from damages and civil penalties, although the amount for each case may be higher or lower. That amount will grow as penalties are

adjusted for inflation. Assuming that amount for cases under the bill, if the government succeeds in three additional cases each year as a result of the bill and whistleblowers receive 20 percent of amounts collected in those cases, CBO estimates that S. 2428 would increase the collection of damages and civil penalties by about \$145 million over the 2022-2032 period. Of that amount, CBO estimates that about \$110 million, \$10 million to \$15 million annually, would result from civil penalties and double or treble damages and be classified as revenues. The remaining roughly \$35 million would result from the collection of damages incurred by agencies. CBO cannot predict which agencies would be affected and whether those amounts would be returned to the Treasury (for deficit reduction) or spent by the agency. As a result, CBO estimates that about half of those amounts would be returned to the Treasury, resulting in a reduction in direct spending of \$17 million over the 2022-2032 period.

Spending Subject to Appropriation

S. 2428 would require DOJ to identify the purpose for dismissing an FCA case brought by a whistleblower and permit that person to challenge the dismissal. CBO anticipates that the provision could prolong litigation and increase the workload of the department's Civil Division. DOJ dismisses roughly 150 FCA cases per year, and it spends \$180,000 per full-time employee, on average, for a monthly cost of \$15,000 per employee. Assuming that providing the reason for a dismissal and working on prolonged litigation for each dismissed case would require an additional month of work, CBO estimates that DOJ would need \$15 million to implement that change over the 2022-2027 period.

The bill also would require GAO to report to the Congress on FCA's effectiveness after enactment of S. 2428. Using information from GAO, CBO estimates that the cost would be less than \$500,000 over the 2022-2026 period; such spending would be subject to the availability of appropriated funds (see Table 1).

Pay-As-You-Go Considerations

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays and revenues that are subject to those pay-as-you-go procedures are shown in Table 1.

Increase in Long-Term Deficits: None.

Mandates: None.

Uncertainty

The estimate of the costs of S. 2428 is subject to considerable uncertainty. For example, the number of additional successful FCA cases brought under the bill

and the average amount of penalties and damages collected could be higher or lower than CBO projects. As a result, the savings from the bill could be much higher or lower than CBO estimates. In addition, it is possible that this expansion of authority would result in less fraud in general by government contractors, which would result in greater deficit reduction than CBO projects.

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